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In the Supreme Court of the United States

OCTOBER TERM, 1967

GENERAL FOODS CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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CITATIONS

Cases:

Brown Shoe Co. v. *United States*, 370 U.S. 294 — 9, 10

Federal Trade Commission v. *Procter & Gamble Co.*, 386 U.S. 568 — 9, 13, 15, 16

United States v. *Philadelphia National Bank*, 374 U.S. 321 — 16

Statutes:

Clayton Act, Section 7, 64 Stat. 1125, 15 U.S.C. 18 — 2, 11

298-741—68——1

QUESTION PRESENTED

Whether the court of appeals correctly upheld the Federal Trade Commission's determination that the acquisition of the S.O.S. Company by General Foods Corporation violated Section 7 of the Clayton Act.

STATUTE INVOLVED

Section 7 of the Clayton Act, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

The petition seeks review of a unanimous judgment of the court of appeals (Pet. App. A) affirming a decision of the Federal Trade Commission (Pet. 191a) that the acquisition in 1957 by General Foods Corp. ("G.F.") of the S.O.S. Company, Inc. ("S.O.S."), a manufacturer of household steel-wool cleaning pads, violated Section 7 of the Clayton Act. The pertinent facts are as follows:

1. The Companies Involved

General Foods. G.F. is the largest multi-product manufacturer and distributor of packaged foods in the United States; it has approximately 50 percent of the total value of domestic shipments of various

grocery products (R. 1a, 13a, 14a, 349a). Between 1955 and 1964, its net sales rose from $825 million to $1.3 billion (Pet. App. A, 3). G.F. markets about 250 items sold under more than 30 well-known brand names, including "Maxwell House," "Post" cereals, "Yuban," "Sanka," "Postum," "Birds Eye," "Jello," "Log Cabin," "Gaines," and "Kool-Aid."

The G.F. products are distributed through five operating divisions and are sold in hundreds of thousands of grocery stores and supermarkets throughout the country. G.F. has engaged in massive efforts to pre-sell its brand names to the ultimate consumer by means of advertising and sales promotions. In 1957, it spent $69 million in this effort, and in 1958, this figure had risen to $87 million (R. 7a, 15a, 16a, 1071a). By 1961, G.F. ranked third among all national advertisers (R. 1299a–1300a).

G.F. also spent substantial amounts to persuade retailers to place G.F. products on desirable shelf space. In 1957 it spent $9.8 million on trade promotions; by 1963, its expenditures for this purpose had more than tripled to $31.5 million (R. 1131a, 1139a).

S.O.S. The first company of significant size to emerge as a steel-wool manufacturer was Brillo, organized in 1913. S.O.S. commenced operations in 1919. It built its business primarily upon a household steel-wool pad impregnated with soap, which the company developed and distributed under the protection of various patents and patent extensions that expired in the 1930's. After the patents expired, Brillo and other companies also began to produce and market steel-wool soap pads (R. 982a, 1010a, 1021a).

In 1957, total industry sales of household steel wool aggregated $28.6 million. The sales of S.O.S. were $14.6 million, or 51 percent, and Brillo's were $13.6 million, or 47.6 percent of total sales (R. 209a, 226a). The remaining 1.4 percent was divided among three small producers, none of which had assets of as much as $500,000 (R., 588a, 641a, 1369a–1370a, 1378a, 1380a 1402a, 1415a–1417a). The court of appeals characterized the industry, on a national basis, as "an almost perfectly balanced duopoly" (Pet. App. A, 4). G.F.'s internal pre-aquisition report noted that "there are only two companies in the field which amount to anything," S.O.S. and Brillo (R. 984a).

In some local or regional markets, S.O.S.'s share was much higher. For instance, in April and May of 1957, its sales represented 77.5 percent of total sales on the Pacific coast, 75 percent in Chicago, 68.5 percent in the west-central region, 65.7 percent in the southwest region, 60 percent in New England, and 58.4 percent in the east-central region. Brillo's sales, on the other hand, accounted for almost 77 percent of total sales in the New York metropolitan area (R. 1027a; see also R. 320a, 452a, 705a, 986a).

2. The Product Market

The manufacture of household steel wool. The manufacture of steel wool is a highly specialized process, calling for critically important technical know-how and skill (R. 974a, 984a, 1021a). Steel wool is fabricated from high grade steel wire (R. 566a, 575a, 1128a, 1941a–1964a), which is drawn from large drums (R. 313a, 486a, 565a, 629a), and then "balled" accord-

ing to grade (R. 486a, 565a–566a, 623a). Thereafter, the balls or "puffs" that are to be converted into soap pads are conveyed into a soap impregnating machine and saturated with liquid soap (R. 486–487a, 566a). Except for packaging in cartons, the entire operation is fully automatic and a continuous process (R. 487a, 984a). In order to take advantage of economies in handling liquid soap and in volume production, and because of the long "start-up" time needed for the machinery, household steel-wool pads are manufactured on a three-shift round-the-clock production schedule (R. 488a–489a, 989a).

As the Commission found, the machinery used in the manufacture of this product is unique, large, complicated and delicate (R. 206a, 568a). The equipment is not available on the open market, but must be custom made to specifications and cannot practically be used to manufacture other products (R. 581a, 596a–598a, 610a–611a).

Characteristics and uses. In the home, steel wool is used principally for cleaning and shining pots and pans (R. 310a, 467a, 521a–522a, 574a, 606a, 625a). It also is used for cleaning whitewall tires, screens, stoves, barbecue grills, golf clubs, asphalt tile floors, and painted walls and surfaces (R. 310a–311a, 467a, 574a, 606a). According to witnesses in the trade, household steel wool is incomparable in the performance of these and a host of similar tasks (R. 315a, 316a, 439a, 575a, 579a, 625a, 703a). Among the witnesses was the former general manager of the S.O.S. division of G.F., who testified that he was familiar with, and had in fact tested, many of the allegedly substi-

tutable products, and had found that none of them could perform as well as S.O.S. pads "for the purposes that we advertise on the box." Consequently, he paid little or no attention to the pricing structure of "these small products" (R. 440a). Representatives of the small steel-wool manufacturing companies testified that their products competed only with other steel-wool products, principally those of S.O.S. and Brillo, and not with other household cleaning aids (R. 201a). These witnesses stated that they paid little attention to the prices of other cleaning products, but instead established their prices in relation to the wholesale prices set by S.O.S. and Brillo (R. 577a, 603a–604a, 623a–624a, 647a–649a).

3. The Merger

Serious negotiations for the purchase of S.O.S. began in 1957, following a general search by G.F. for attractive consumer products companies and the narrowing of the list to S.O.S. and two others (R. 1024a). After the controlling stockholders of S.O.S. indicated their willingness to sell, G.F.'s acquisition department undertook a detailed study of the company and of the steel-wool industry. The study concluded that Brillo was the only competition worth reckoning with, and that the acquisition would offer G.F. a "dominant position in a tight little specialty market" (R. 1021). The report also stated that:

> The processing of steel wool, however, is a specialty of its own. Thus it is not so exposed to fortuitous invention by other consumer goods

> marketers * * *. S.O.S. has as protectible a position as G.F. will get a chance at for many years to come [R. 974a].

On December 31, 1957, G.F. acquired S.O.S. for stock worth about $17.5 million, about three times the book value of its assets (R. 3a, 14a, 191a, 350a, 960a–964a, 1073a).

4. Post Acquisition Developments

Immediately after the merger S.O.S. was operated as a separate division of G.F. In 1960, however, it became part of the Kool-Aid division (R. 352a–353a). G.F. eventually supplied new management for S.O.S. and entrusted S.O.S. advertising to a new agency (R. 424a–425a, 427a, 694a–695a). On the advice of this agency S.O.S. substantially increased its expenditures for television advertising, from an average of $1.25 million annually in the period 1954–57 to $2.25 million annually during 1960–63 (R. 1029a–1030a, 1133a). Additionally, in 1963 G.F. spent $211,083 for S.O.S. consumer promotions and an additional $137,736 on trade promotions (R. 1134a–1135a). Prior to the merger S.O.S. had not utilized trade promotions and had spent very little for consumer promotions (R. 952a, 995a, 1047a–1049a, 1356a). Sometime after the merger, S.O.S. pads began to be sold through G.F. distribution centers from which customers could order the whole range of G.F. products and receive discounts on substantial multi-product purchases (R. 380a, 1054a, 1138a).

Although S.O.S.'s market share had fallen from 52.8 percent to 51 percent between 1955 and 1957, and

then to 49.4 percent in 1959, in 1960 its sales began to increase and by 1962 it had captured 56 percent of the market. Brillo attempted to counter the G.F. gains by substantially increasing its advertising expenditures and engaging in consumer and trade promotions, but in the expanding steel-wool market of 1959–1962 it suffered not only a loss of relative market share but also an absolute decline in dollar sales (Pet. 244a). The result, as the court of appeals described it, was that "[c]onfronted with steadily falling sales, a dangerously declining market share, and mounting advertising and promotional expenses, Brillo, in December 1963, ceased operations as an independent company and merged with Purex Corporation, Ltd." (Pet. App. A, 6–7).

5. The Commission's Decision

The Commission held that household steel-wool pads constitute an appropriate line of commerce, or product market, for measuring the effect of the acquisition (Pet. 192a–208a). On the basis of a detailed analysis of the evidence (*ibid.*), it rejected petitioner's contention that "approximately 40 other kitchen cleaning devices, composed of such materials as plastic, cellulose and metals other than steel," must be included in the market (Pet. 192a). After examining the competitive effects of the merger (Pet. 208a–222a), the Commission

> concluded that General Foods' acquisition of S.O.S. will in fact substantially lessen competition in the steel wool pad market. We have based this conclusion on our finding that

> respondent's acquisition of S.O.S. has raised to virtually insurmountable heights entry barriers which were already high, that the presence of General Foods in the market has changed the steel wool pad market which prior to the merger consisted of two substantially equal-sized companies and several smaller firms to one in which S.O.S. is now dominant, and finally that the substitution of General Foods for S.O.S. will depress rather than enhance the competitive vitality of the market and will paralyze any incentive to compete which might otherwise have existed [Pet. 221a].

The Commission therefore held that the acquisition violated Section 7, and directed G.F. to divest itself of S.O.S. (Pet. 222a–223a). The court of appeals unanimously affirmed (Pet. App. A).

ARGUMENT

This case presents no question warranting review by this Court. The issues raised by the petition relate primarily to the Commission's definition of household steel wool as a relevant product market, and its conclusion that the acquisition had the probable effect of raising barriers to entry and substantially reducing competition in that market. The Commission's decision was entirely consistent with applicable decisions of this Court, *e.g.*, *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, and *Brown Shoe Co.* v. *United States*, 370 U.S. 294, and was, as the court of appeals concluded, fully supported by substantial evidence.

1. Contrary to petitioner's contention (Pet. 21, 18–

22), the holding in this case is not the broad proposition that "substitutional competition is legally irrelevant for Section 7 purposes". The Commission (including the dissenting Commissioner, Pet. 255a) justifiably found that household steel wool is an economically significant relevant product market (or "submarket"), partly on the basis of the fact that "the prices of steel wool pads * * * bear little or no relationship to the prices of non-steel wool cleaning devices" (Pet. 205a) and that "steel wool manufacturers paid little or no attention to the prices of the non-steel wool devices" (*ibid.*). The Commission thereupon proceeded in accordance with this Court's directive in *Brown Shoe, supra,* 370 U.S. at 325, that

> it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. *If such a probability is found to exist, the merger is proscribed.* [Emphasis added.]

Thus, upon finding that the acquisition would have the proscribed anticompetitive effect in the household steel-wool market, the Commission properly concluded that its inquiry was at an end. It is only in this context that the Commission rejected petitioner's contention that "we must nevertheless still consider the broader cleaning device market in our assessment of the competitive impact" of the merger (Pet. 198a n. 5). The dissenting Commissioner, disagreeing with the majority's evaluation of the evidence concerning the effect of the acquisition on competition

in the steel-wool market (Pet. 254a–255a), went on to consider questions relating to the broader market of substitutional competition which the majority properly deemed irrelevant to their decision. But, as the court of appeals recognized, this difference of opinion within the Commission provided no basis for the court to substitute its judgment for that of the Commission as to the inferences to be drawn from the evidence.

To the extent that this contention of petitioner is merely a reassertion, in slightly altered form, of the market definition argument which it advanced unsuccessfully before the Commission and the court below, the issue remains one that is merely factual and does not call for further review. In concluding that steel-wool soap pads were a distinct and significant product market for Section 7 purposes, the Commission considered in some detail the alleged substitute products. It found, however, that many of the alleged substitutes did not possess physical characteristics enabling them to compete with steel wool in its main use of scrubbing and polishing pots and pans (Pet. 202a–204a). The Commission also found that the prices of the alleged substitutes were different from and independent of those of steel-wool soap pads (Pet. 204a–206a). The court of appeals expressly affirmed these findings (Pet. App. A, 11–14).

Moreover, the Commission's decision to give little weight to the availablity of alleged substitutes rests in substantial part on the identical judgment of petitioner itself and competing steel-wool manufacturers. G.F.'s own market study concluded that the only significant competition for S.O.S. was Brillo steel-

wool soap pads (R. 350a, 966–1027a). G.F.'s own analysis was that plastic scrubbers such as "Tuffy" are "complementary rather than competitive" to steel-wool soap pads (R. 952a). Steel-wool manufacturers testified that they considered steel-wool pads a distinct market and that they paid little or no attention to the prices of non-steel-wool scrubbing devices (*supra*, p. 6).

Despite the strong evidentiary basis for the Commission's conclusion, petitioner now argues that greater weight should have been given to technological changes and promotional efforts on behalf of substitute products which ultimately may make inroads into the secure position steel wool now has in the field of household scouring products (Pet. 18–20). But in the ten-year period since the acquisition, during which petitioner claims that substitutes were enjoying substantial growth, S.O.S. has never been forced by the competition to lower its price. Indeed, its only price change was an increase (Pet. 217a–218a, n. 12), strongly suggesting a continuing substantial insulation from substitute competition.[1]

[1] Petitioner asserts that substitute products "are actually drawing business away from that submarket [steel-wool pads] at a rate which foreshadows the demise of the submarket itself" (Pet. 18–19). But the affidavit dated November 30, 1967, upon which petitioner bases this assertion (Pet. App. C; see Pet. 7 n. 5) does not indicate whether substitute products are being used for the purposes for which the Commission found that steel-wool pads have no effective substitutes (Pet. 202a–204a) or whether, instead, the alleged decline in steel-wool sales is attributable to increased kitchen use of such articles as teflon-coated or ceramic pots and pans, frozen foods in throw-away containers, throw-away broiler pans, aluminum foil, etc.

2. The substitution through merger of a powerful acquiring firm for a smaller, but already dominant firm may be unlawful because it adversely affects the competitive structure of the acquired firm's market by raising entry barriers. *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 578. The Commission found that G.F.'s acquisition of S.O.S. would have this anticompetitive effect (Pet. 215a). Although G.F. disputed this finding below, the court of appeals concluded that there was substantial evidence that barriers to entry were "substantially heightened" by the acquisition (Pet. App. A, 19). Petitioner now argues that it was error for the Commission and the court below to disregard the size and strength of alleged potential entrants whose resources and marketing ability may be comparable to G.F.'s. The contention appears to be that, despite *Procter & Gamble*, acquisition by a giant outside firm of a dominant factor in a concentrated market, which has the effect of further entrenching that dominance and raising barriers to the entry of new competitors, is illegal only if barriers are raised high enough to keep out every potential entrant, no matter how large and powerful.

Not only is this argument unsupportable as a legal proposition, but an even more fundamental weakness is that the record references cited on page 12 of the petition do not establish that the large firms there identified by petitioner as "potential entrants into the steel wool soap pad business" are so in fact. To the extent that those record references relate to activities involving household scouring devices at all, they

refer only to present or potential activities relating to the making or marketing of plastic or other non-steel-wool devices. None of the cited companies has experience in the production of steel wool, which the record establishes as a highly complex and difficult process (see *supra*, pp. 4–5).

But even assuming that a few giant companies capable of exercising competitive leverage comparable to that of General Foods might have been potential entrants into the steel-wool scouring pad business, petitioner's argument would still be inadequate. The substitution of General Foods for S.O.S. as the dominant seller in the market was likely to increase the costs and competitive risks of entry for any potential competitor, even the largest and strongest. The Commission thus properly concluded that the merger had increased entry barriers—thereby making such barriers "insurmountable" for some companies with a consequent reduction in the number of potential entrants, as well as generally blunting incentives to enter, with the consequent probability that prices charged by firms in the market could be raised still higher before any new entrant, however large, would be attracted.[2]

3. Finally, this case presents no occasion for review of petitioner's contention that achievement of operating efficiencies cannot be relied upon as an affirmative

[2] The alleged fact that, *after the hearing examiner and the Commission had ordered G.F. to divest itself of S.O.S.*, Colgate-Palmolive first introduced its steel-wool soap pad into the United States, (Pet. 7 n. 5; Pet. App. C, 4–5), does not undermine the Commission's finding that the merger increased entry barriers.

ground for prohibiting a conglomerate merger (Pet. 26–29). That was not the basis of the Commission's decision. The Commission held that the present case was controlled by its previous decision in *Procter & Gamble Co.* (see 386 U.S. 568). This was clearly articulated in the Commission's opinion (Pet. 208a):

> The acquisition of S.O.S. by General Foods demonstrates the same anticompetitive effects as the acquisition by Procter & Gamble of The Clorox Chemical Company, which the Commission recently held to be violative of Section 7 of the Clayton Act. * * * There is a substantial identity both in the structure of the household steel wool market involved in this case and the structure of the liquid bleach market involved in the *Clorox* case and in the significant operative facts respecting the impact of those mergers in their respective markets. A detailed comparative analysis of the relevant facts in the two cases is attached hereto as Appendix A.

Appendix A to the Commission's opinion demonstrates in detail that substantially the same competitive advantages found in *Procter & Gamble* to have accrued to Clorox as a result of that merger would also accrue to S.O.S. as a result of the present merger (Pet. 234a–236a, 239a–241a). It was on the basis of these competitive advantages—with their consequent raising of entry barriers and restraining of the vigor of competition in the relevant market itself—that this Court upheld the Commission's decision in *Procter & Gamble*, and it therefore follows that the Commission similarly was justified in condemning the present

merger.[3] The fact that the Commission also stated that the present merger would confer upon S.O.S. additional competitive advantages that the Procter & Gamble merger did not confer upon Clorox (Pet. 237a–238a) and hence that its *Clorox* decision was "applicable with even greater force" in the present case (Pet. 209a), neither undermined the agency's basic conclusion that *Procter & Gamble* controlled this case nor indicated that those additional competitive advantages were essential to its holding of illegality. It is, of course, settled law that these additional competitive advantages (or "efficiencies" as petitioner calls them) conferred upon S.O.S. cannot justify an otherwise unlawful merger. *Procter & Gamble Co., supra*, 386 U.S. at 580; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 371.

[3] It may further be noted that the competitive advantages thus relied upon in these two cases are not production or distribution efficiencies that would be available to any firm and would exist in a truly competitive market, but are advantages available to a particular competitor only because of its sheer market power. For example, nothing in the record would indicate that the volume discounts that G.F. could obtain for S.O.S. television and other media advertising reflect any savings in operating costs by the media. Cf. *Procter & Gamble*, *supra*, 386 U.S. at 579. Similarly, the Commission's finding that G.F. probably would be able to obtain favored display and shelf space for S.O.S. (Pet. 239a) plainly is unrelated to any possible cost savings by retailers. Cf. *Procter & Gamble*, *supra*, 386 U.S. at 575.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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